Filed 10/27/20 P. v. Cervantes CA2/1

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>MARTIN ERNESTO CERVANTES,<br><br>Defendant and Appellant. | B303545<br><br>(Los Angeles County Super. Ct. No. TA139012) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Ricardo R. Ocampo, Judge. Affirmed.

Robert D. Bacon, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Noah P. Hill and Steven E. Mercer, Deputy Attorneys General, for Plaintiff and Respondent.

---

Defendant Martin E. Cervantes was convicted of one count of first degree murder, two counts of assault on a peace officer with an assault weapon, two counts of possession of a firearm by a felon, and one count of battery upon a peace officer. Evidence presented at trial showed that Cervantes shot and killed the murder victim with an AR-15 assault rifle and later fired an AK-47 assault rifle at police officers during a high-speed car chase. The trial court imposed an aggregate prison term of 83 years to life, which included a firearm enhancement of 25 years to life on the murder conviction and another firearm enhancement of 20 years on one of the convictions for assault on a peace officer with an assault weapon.[1] On appeal, we affirmed Cervantes's convictions and remanded the matter to allow the trial court to consider whether to strike the firearm enhancements.

Upon remand, the trial court declined to strike the firearm enhancements and reinstated the original judgment.

On appeal, Cervantes claims that the trial court abused its discretion in deciding not to strike the firearm enhancements. In particular, Cervantes asserts that the lower court improperly relied upon irrelevant aggravating factors that overlapped with the elements of the underlying offenses; it erroneously found that no mitigating factors weighed against the imposition of the enhancements; and, given Cervantes's potential eligibility for a youth offender parole hearing, the firearm enhancements would serve no penological purpose. We reject each of these arguments

---

[1] Although the trial court imposed yet another firearm enhancement of 6 years 8 months on the other conviction for assault on a peace officer with an assault weapon, the prison sentence for that count was stayed.

and conclude that Cervantes has failed to establish that the trial court's decision was irrational or arbitrary. Concluding there was not error, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

We summarize only those facts that are relevant to this appeal.

The People charged Cervantes with one count of first degree murder, in violation of Penal Code[2] section 187, subdivision (a); two counts of assault on a peace officer with an assault weapon, in violation of section 245, subdivision (d)(3); two counts of possession of a firearm by a felon, in violation of section 29805; and one count of battery upon a peace officer, in violation of section 243, subdivision (c)(2). (See *People v. Cervantes* (Feb. 26, 2019, B285203) (*Cervantes I*).)[3] In connection with the murder count, the People alleged that, for the purposes of section 12022.53, subdivision (d), Cervantes personally and intentionally discharged a firearm and proximately caused death.[4] With respect to the two counts of assault on a peace

---

[2] Undesignated statutory citations are to the Penal Code.

[3] Certain facts are derived from our opinion issued in Cervantes's prior appeal, *Cervantes I*.

[4] Section 12022.53, subdivision (d) provides in pertinent part: "Notwithstanding any other provision of law, any person who, in the commission of a [murder], personally and intentionally discharges a firearm and proximately causes great bodily injury . . . or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life." (§ 12022.53, subd. (d); see also *id.*, subd. (a)(1) ["This section applies to the following felonies: [¶] . . . Section 187 (murder)."].)

officer with an assault weapon, the People alleged Cervantes personally and intentionally discharged a firearm for the purposes of section 12022.53, subdivision (c).[5]

Evidence presented at trial showed that on December 31, 2015, Cervantes and a fellow gang member stole a truck, and the gang member thereafter hit a parked car.[6] (See *Cervantes I*, *supra*, B285203.) Cervantes used an AR-15 assault rifle to shoot and kill the owner of the parked car after the owner confronted Cervantes's fellow gang member about damage to the parked vehicle. (See *id.*) This incident gave rise to the first degree murder charge against Cervantes. (See *id.*)

On January 5, 2016, as police attempted to arrest Cervantes, he and another individual fled in a high-speed car chase. (*Cervantes I*, *supra*, B285203.) During the chase, Cervantes repeatedly shot his AK-47 assault rifle out of the vehicle's passenger window while being pursued by a police helicopter and marked law enforcement vehicles. (*Cervantes I*, *supra*, B285203.) The two counts of assault on a peace officer with an assault weapon arise from this pursuit. (See *id.*)

---

[5] Section 12022.53, subdivision (c) provides in relevant part: "Notwithstanding any other provision of law, any person who, in the commission of [an assault with a firearm on a peace officer], personally and intentionally discharges a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 20 years." (§ 12022.53, subd. (c); *id.*, subd. (a)(7) ["This section applies to the following felonies: [¶] . . . [¶] Subdivision (d) of Section 245 (assault with a firearm on a peace officer or firefighter)."].)

[6] The remainder of this paragraph and the following paragraph summarize facts based on evidence introduced at trial.

The jury found Cervantes guilty on the six counts described above.[7] (See *Cervantes I*, *supra*, B285203.) The jury also found true the firearm enhancements arising under section 12022.53, subdivisions (c) and (d).

At Cervantes's sentencing hearing, the court found the following aggravating factors: (1) "[T]he crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness"; (2) "[Cervantes] was armed with and used a weapon at the time of the commission of the crime"; (3) "[t]he victim was particularly vulnerable"; (4) "[Cervantes] induced others to participate in the commission of the crime and was, in fact, a dominant participant and leader in this crime"; (5) "[t]he manner in which the crime was carried out also indicates planning, sophistication, and professionalism"; (6) "[Cervantes] engaged in violent conduct that indicates a serious danger to society"; (7) Cervantes's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous and of increasing seriousness; (7) "[Cervantes] has served a prior term in prison"; (8) "[Cervantes] was on probation or mandatory supervision or post release community supervision or parole at the time the crime was committed"; and (9) "[Cervantes's] prior performance on probation or supervision was unsatisfactory." The court further remarked that "[e]ven after careful consideration of what was presented in trial and the arguments of counsel, [the] court finds no circumstance in mitigation."

---

[7] Although the People initially charged Cervantes with eight counts, two of them were not submitted to the jury. Those two charges are not relevant to this appeal.

The court sentenced Cervantes to an aggregate prison term of 83 years to life, which includes, inter alia, a term of 25 years to life on the murder conviction, along with an enhancement of 25 years to life pursuant to section 12022.53, subdivision (d); and a sentence of 8 years for one of the convictions for assault on a peace officer with an assault weapon, along with an enhancement of 20 years pursuant to section 12022.53, subdivision (c).[8] (*Cervantes I*, *supra*, B285203.) Cervantes appealed this judgment. (*Cervantes I*, *supra*, B285203.)

In *Cervantes I*, we affirmed Cervantes's convictions, but remanded the matter to the trial court to correct certain errors in the abstract of judgment and determine whether to strike the firearm enhancements pursuant to an amendment to the Penal Code that took effect after the sentencing hearing. (*Cervantes I*, *supra*, B285203.)

On remand, Cervantes moved to strike the firearm enhancements added to his sentence for murder and his sentence for the two counts of assault on a peace officer with an assault

---

[8] The trial court also imposed, but stayed pursuant to section 654, a prison term for the other conviction for assault on a peace officer with an assault weapon, which includes an enhancement under section 12022.53, subdivision (c). Although the reporter's transcript indicates the court imposed an aggregate prison sentence of 9 years 4 months on this count, the minute order for the sentencing hearing instead shows the court sentenced Cervantes to 7 years 4 months in prison for this conviction. This discrepancy has no impact on the instant appeal. In any event, both the reporter's transcript and the minute order indicate that 6 years 8 months of Cervantes's sentence for this count is attributable to the firearm enhancement provided under section 12022.53, subdivision (c).

weapon. In his motion, Cervantes argued, inter alia, his youngest son was murdered while Cervantes was incarcerated for a nonviolent theft offense, and this tragic event caused Cervantes to use methamphetamines and, ultimately, attempt to provoke the police to kill him, or, in his appellate counsel's words, "commit 'suicide by cop.' "

The trial court heard Cervantes's motion to strike on December 19, 2019. At the beginning of the hearing, the court stated it "considered what was presented before at the time of sentencing and the . . . additional material" Cervantes filed after the case had been remanded, including materials relating to the death of Cervantes's son. The court thereafter denied Cervantes's motion to strike and, upon making the corrections to the abstract of judgment required by our opinion in *Cervantes I*, reinstated Cervantes's original sentence. In rendering this decision, the court remarked: "[I]t is tragic what happened to Mr. Cervantes's family with regard[ ] to his son and the court feels for that. However, after careful consideration of all presented for sentencing at the time of sentencing as well as now and in light of the court's discretion . . . under [section] 12022.53, the court makes the same findings of mitigation and aggravation and finds no good cause at this time to modify the original sentence and the original sentence shall remain."

Cervantes timely appealed.

## DISCUSSION

"Senate Bill No. 620 (2017–2018 Reg. Sess.), which added section 12022.53, subdivision (h), gave the trial court discretion 'in the interest of justice pursuant to Section 1385 and at the time of sentencing, [to] strike or dismiss an enhancement otherwise required to be imposed by this section.' [Citation.] [¶]

' "[A] court's discretionary decision to dismiss or to strike a sentencing allegation under section 1385 is" reviewable for abuse of discretion.' [Citation.] 'In reviewing for abuse of discretion, . . . . " '[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.]' " ' " (*People v. Pearson* (2019) 38 Cal.App.5th 112, 116 (*Pearson*).)[9] Under this standard, " ' "[a]n appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge." ' " (*Pearson*, *supra*, at p. 116.)

When determining whether to strike or dismiss an enhancement, the trial court must consider "the factors listed in California Rules of Court, rule 4.410 (listing general objectives in sentencing), as well as circumstances in aggravation and mitigation under California Rules of Court, rules 4.421 and 4.423." (See *Pearson*, *supra*, 38 Cal.App.5th at p. 117.) " '[U]nless the record affirmatively reflects otherwise,' the trial court is deemed to have considered the factors enumerated in the California Rules of Court." (*Ibid.*, quoting Cal. Rules of Court, rule 4.409.)

Cervantes argues the trial court abused its discretion in declining to strike the firearm enhancements imposed under

---

[9] Cervantes cites *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, for the proposition that a "decision need not be arbitrary or irrational to constitute an abuse of discretion." *Drew* is not instructive because it concerned a trial court's order denying a motion for attorney fees in a civil matter. (See *Drew*, *supra*, 207 Cal.App.3d at pp. 1292, 1297.) Thus, we adhere to our prior holding in *Pearson* that a decision not to strike a firearm enhancement must be irrational or arbitrary to amount to an abuse of discretion. (*Pearson*, *supra*, 38 Cal.App.5th at p. 116.)

section 12022.53, subdivisions (c) and (d). Specifically, Cervantes contends: (1) The trial court could not rely upon "aggravating factors that . . . partially overlap with the elements of the offense"; (2) the trial court relied upon aggravating factors that were inapplicable to the instant case; (3) the court erred in finding there were no mitigating factors; and (4) imposing the firearm enhancements serves no penological purpose because Cervantes will be eligible for a youth offender parole hearing in the 25th year of his incarceration, regardless of whether the enhancements are added to his sentence.

### A. The Trial Court Properly Considered Aggravating Factors that Overlap with Elements of the Underlying Offenses

Cervantes contends that "discretion counsels against reliance on aggravating factors that even partially overlap with the elements of the offense," "[e]specially when [(as Cervantes believes is the case here)] the term prescribed for the enhancement[s] is so disproportionate to the principal term . . . ." Cervantes argues that the elements of the assault on a peace officer with an assault weapon convictions and the aggravating factors relating to the enhancement provided under section 12022.53, subdivision (c) overlap because the only element required by the firearm enhancement and not the underlying offenses is the "intentional discharge of the firearm." He also claims that this element does not "warrant more than tripling the term" because "the intentional discharge of the firearm is not . . . an uncommon means of committing this offense." Additionally, Cervantes seems to argue there is a "partial[ ] overlap" between the enhancement provided under section 12022.53, subdivision (d) and the murder conviction

because "use of a firearm is a sufficiently common means of committing murder that it is adequately taken into account by the prescribed sentence for murder itself . . . ."

Cervantes's assertion that the trial court could not consider aggravating factors that partially overlap with the elements of the underlying offenses contravenes this Division's precedent.

In *Pearson*, we held "[t]he factors that the trial court must consider when determining whether to strike a firearm enhancement under section 12022.53, subdivision (h) are the same factors the trial court must consider when handing down a sentence in the first instance." (See *Pearson*, *supra*, 38 Cal.App.5th at p. 117.) In so ruling, we cited California Rules of Court, rules 4.410, 4.421, and 4.423, in addition to "the factors expressly listed for determining whether to strike enhancements listed in California Rules of Court, rule 4.428(b)." (*Pearson*, at p. 117.) We rejected the defendant's argument in that case that in exercising its discretion to strike a firearm, the trial court works with a "blank slate." (*Id*. at p. 116.)

Cervantes interprets that holding to stand for the proposition that the factors to be considered when determining whether to strike a firearm enhancement "are the same factors the trial court must consider *when deciding whether to exercise discretion to impose a section[ ]12022.53 enhancement* in the first instance." *Pearson* had no occasion to make such a pronouncement, given that when the trial court initially imposed the enhancement in that case, it had no discretion to do otherwise. (See *Pearson*, *supra*, 38 Cal.App.5th at pp. 115–116.) Moreover, *Pearson* explicitly stated that "[r]esentencing after new legislation that applies to sentences not yet final can de[rive] context from what would otherwise be a decision made during the

original sentencing hearing." (See *id.* at p. 117, italics added.) Thus, the trial court did not abuse its discretion in considering sentencing factors that relate to the underlying offenses when deciding whether to strike the firearm enhancements.

Cervantes also contends that the partial overlap between the elements of the underlying offenses and the requirements of section 12022.53, subdivisions (c) and (d) renders the enhancements "neither necessary nor sufficient" to serve section 12022.53's purpose of deterring persons from using firearms to commit specified felonies. (Citing *People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1314 ["[T]he purpose of section 12022.53 is to deter persons from using firearms in the commission of specified felonies."].) Although essential elements of these offenses may overlap with the firearm enhancements, we disagree that the trial court acted irrationally or arbitrarily in tacitly finding that these enhancements would serve a deterrence purpose.

### B. Cervantes Fails to Demonstrate That the Trial Court Relied Upon Inapplicable Aggravating Factors

Although not entirely clear, Cervantes's next argument is that the trial court abused its discretion in considering aggravating factors relating to the violent and dangerous nature of his conduct because his offenses were not " ' "distinctively worse than the ordinary." ' " (See *People v. Hicks* (2017) 17 Cal.App.5th 496, 512.) In particular, Cervantes argues that "[i]t is difficult to imagine an assault on a peace officer with an assault weapon that was not 'violent' and did not 'indicate[ ] a serious danger to society[,]' " and that these offenses "necessarily involved the 'threat of great bodily harm.' " Cervantes further

claims that "[m]urder by definition inflicts 'great bodily harm,' whether a firearm is used or not."

These arguments fail because Cervantes does explain why, *under the facts of this case*, it was arbitrary or irrational for the trial court to find that Cervantes's crimes were distinctively more violent and more dangerous than the ordinary murder or assault with an assault weapon. Nor is it apparent that Cervantes's crimes were not distinctively worse than ordinary, given that he used an AR-15 assault rifle to shoot the murder victim multiple times in the head, and that he discharged an AK-47 assault rifle at police officers during a high-speed automobile chase. (See *Cervantes I*, *supra*, B285203).)

Cervantes also contends that his "dominant or leadership role in the offenses" is not a relevant aggravating factor because "there is no evidence that he dominated the co-participants by threatening them with a firearm."

We reject this argument because Cervantes fails to cite any authority establishing that this aggravating factor is applicable only if the defendant threatens his accomplices with a weapon. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793 (*Stanley*) [" '[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration. [Citations.]' [Citations.]"].) Moreover, the record shows that Cervantes's assertion of a "dominant or leadership role" was inextricably intertwined with his firearm usage. Cervantes used an AR-15 assault rifle to murder a person who confronted one of Cervantes's fellow gang members, and Cervantes fired an AK-47 assault rifle from a vehicle driven by an accomplice. (See *Cervantes I*, *supra*, B285203).) Thus,

Cervantes fails to establish that it was arbitrary or irrational for the trial court to consider this aggravating factor.

### C. The Trial Court Did Not Act Arbitrarily or Irrationally in Concluding There Were No Mitigating Factors

Cervantes contends the trial court "abused [its] discretion by failing to acknowledge that [he] . . . was the surviving parent of a homicide victim." This contention is belied by the record. In denying Cervantes's request to strike the firearm enhancements, the trial court remarked that "it is tragic what happened to Mr. Cervantes's family with regard[ ]to his son and the court feels for that."

Insofar as Cervantes maintains the court failed to afford *sufficient weight* to this factor, he fails to state a proper claim for appellate relief. (See *People v. Lamb* (1988) 206 Cal.App.3d 397, 401 [" 'Sentencing courts have wide discretion in weighing aggravating and mitigating factors [citations], and may balance them against each other in qualitative as well as quantitative terms.' . . . [T]he trial court need not state reasons for minimizing or disregarding circumstances in mitigation [citation]."]; *Pearson*, *supra*, 38 Cal.App.5th at p. 116 [" ' " ' "An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge." ' " ' "].)

### D. Cervantes's Future Eligibility for a Youth Offender Parole Hearing Did Not Deprive the Trial Court of Discretion to Decline to Strike the Firearm Enhancements

Cervantes argues that the firearm enhancements do not "serve any penological purpose" because he "will be eligible for a

youth offender parole hearing in his 25th year of incarceration regardless of whether his sentence" includes the firearm enhancements, and "the Board of Parole Hearings will consider the same factors . . . regardless of whether the enhancements are imposed."[10]

In effect, Cervantes invites this court to exempt from section 12022.53 any defendant who, after accounting for all applicable firearm enhancements, will nonetheless be entitled to a youth offender parole hearing before he or she would otherwise receive a parole hearing.

We demur to this invitation. The text of section 12022.53 does not include any such exemption. (See § 12022.53, subds. (a)–(*l*).) Because "a court cannot insert qualifying provisions not included or rewrite the statute to conform to an assumed intention which does not appear from its language," (see *People v. Haney* (1984) 156 Cal.App.3d 109, 115), the trial court did not err in declining to strike the firearm enhancements,

---

**10** "Youth offenders who committed their 'controlling offense' [(i.e., the offense or enhancement for which any sentencing court imposed the longest term of imprisonment)] prior to reaching a specified age are entitled to a parole hearing after serving a designated period in custody. . . . [¶] . . . By a[n] . . . amendment that became effective January 1, 2018, the Legislature . . . extended the availability of youth offender parole hearings to offenders who were under 25 years old when they committed their controlling offenses." (See *In re Howerton* (2020) 44 Cal.App.5th 875, 881, review granted June 24, 2020, S261157.) For the purposes of this appeal, the parties do not dispute that Cervantes will be eligible for a youth offender parole hearing in his 25th year of incarceration.

notwithstanding Cervantes's future eligibility for a youth offender parole hearing.

Cervantes nonetheless insists that Civil Code section 3532 provides "[t]he law neither does nor requires idle acts[,]" and that Civil Code section 3510 states "[w]hen the reason of a rule ceases, so should the rule itself." (Quoting Civ. Code, §§ 3510, 3532.) Cervantes does not explain why these *Civil* Code sections have any bearing on the propriety of the trial court's interpretation and application of *Penal* Code section 12022.53, subdivision (h) and *Penal* Code section 1385 to this case. (See *Stanley*, *supra*, 10 Cal.4th at p. 793; cf. *People v. Chevron Chemical Co.* (1983) 143 Cal.App.3d 50, 52, 54–56 & fn. 2 [holding that two statutes could not be read in pari materia in part because "one [section was] criminal and the other civil"].)

**DISPOSITION**

The judgment is affirmed.
NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J. SINANIAN, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.